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No. 86-882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE; ALICE ROE; DIANA ROE; NADINE T.; JANET T.; and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

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QUESTION PRESENTED

Should a prejudgment writ of certiorari be granted where the case does not present an issue of urgent public importance and where another case already before the Court, with which Petitioners urge tandem consideration, raises a much narrower issue?

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Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of this case prior to judgment by the Eighth Circuit Court of Appeals.

STATEMENT OF THE CASE

A. The Statute.

The statute at issue in this case is set forth at 143a-151a of Petitioners' Appendix (hereinafter cited "P.A.").

B. History of the Litigation.

Plaintiffs'[1] chronology of events as set forth on pages 3-5 of the Petition is substantially accurate. However, it is seriously deficient in at least one critical respect. Plaintiffs refer only in passing to the order of the district court on January 23, 1985 granting Defendants summary judgment on four of five issues. Such brief mention, however, fails to do justice to the effect of that order in framing the issues for trial and ultimate decision by the district court.

The full text of the district court's summary judgment order as set out at P.A. 1a-33a makes it clear that the issues upon which trial was to focus did not include those which Plaintiffs now advance as requiring this Court's immediate attention. In granting partial summary judgment, the district court acknowledged that the legal framework for this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983). Thus the district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notifica-

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[1] Respondents/Defendants will follow Petitioners' practice of referring to the parties by their posture in the district court.

> tion/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional.

Memorandum Order of the District Court, Alsop, J., dated January 23, 1985 (hereinafter "Summary Judgment Order"). P.A. at 12a.

> The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

Id. at 13a.

Thus it is clear, and Defendants reasonably believed, that trial in this matter was not to be held to explore, through alleged "evidence," the correctness of the legal principles recognized by this Court in *Ashcroft*, 462 U.S. 476 (1983); *Matheson*, 450 U.S. 398 (1981); and *Bellotti II*, 443 U.S. 622 (1979). Nor would it appear that the factual nature of the supposed "burden" imposed by the underlying requirement of advance notice to both parents was to be tried as an issue of fact insofar as it relates to the functioning of the notice/bypass system operating in tandem.

What was reserved by the district court for trial was the question of whether the Minnesota parental notification/judicial bypass system functioned in accordance with the *Bellotti II* standards.

> [T]he court is of the opinion that there are genuine issues of material fact in dispute on this claim and that Defendants have failed to show that Plaintiffs are not

> entitled to recover under any discernible circumstances. Specifically, Plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept Defendants' contention that Plaintiffs have presented only immaterial and anecdotal factual issues.

Summary Judgment Order. P.A. at 19a-20a.

Upon these factual issues which *were* framed for trial, it is clear that the Defendants were entitled to, and did, prevail.[2] Unaccountably, however, the district court, notwithstanding its conclusions of law upon summary judgment, invalidated the statute because it felt that the 48 hour waiting period and the two-parent notice requirement applicable to those minors who do not obtain judicial dispensation are unduly burdensome.

It is also pertinent to note that subsequent to the proceedings set forth in the Petitioners' statement of the case, the district court denied a motion to stay its injunction pending appeal to the Eighth Circuit.[3]

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[2] *See* Findings of Fact, Conclusions of Law and Order of the District Court dated November 6, 1986 (hereinafter "Final Order"), findings No. 30-42 at P.A. 50a-56a; Conclusions of Law at P.A. 119a-120a; and Final Order at P.A. at 120a, where the court says:

> [Accordingly, the court concludes that the] judicial bypass procedure created by Minn. Stat. § 144.343 (6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, complies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

(Bracketed material omitted in Petitioners' Appendix.)

[3] *Hodgson v. State of Minnesota*, No. 3-81 Civ. 538 (D. Minn. Dec. 1, 1986) (order of Alsop, J.).

REASON FOR DENYING THE WRIT

This Case Does Not Satisfy the Criteria Established by This Court for Justifying the Extraordinary Relief Requested.

Rule 18 of the Supreme Court of the United States provides:

> A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

This case simply does not meet that standard. That is not to say that the constitutional and public policy issues raised herein are not important. Nor are they without the keen and substantial interest of both the parties here and the governments and citizens of other states. However, virtually *all* cases ultimately chosen for hearing by this Court involve important legal issues of substantial national interest. The clear and proper tenor of Rule 18 is that the orderly appellate process is to be circumvented only in those rare instances of special exigency or national crisis in which the welfare of the nation or the ability to carry out a strong national policy demands swift and final resolution by this Court itself. This case, important as it is to the people of Minnesota, does not presently fall into that category. It does *not* deal with an urgent constitutional crisis at the highest levels of government as was the case in *United States v. Nixon*, 418 U.S. 683 (1974). Nor does it deal with the authority to sustain the supply of needed materials in a time of national emergency as in *United States v. United Mine Workers*, 330 U.S. 579 (1952). There is not even the sense of need for prompt resolution of

nationwide federal authority prior to upcoming national elections that prompted the Court's action in *United States v. Thomas*, 361 U.S. 950 (1960).

This is a case addressing primarily an issue of the functioning of a Minnesota statute administered in Minnesota by Minnesota officials. While it may provide the Court with an opportunity to further develop the concepts already established in such cases as *Bellotti v. Baird*, 443 U.S. 622 (1979); and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983), it does not present a situation in which the claimed rights of any nationwide class of persons must be or would necessarily be quickly resolved. Indeed since enforcement of the Minnesota law is presently enjoined, even the class of Minnesotans represented by Plaintiffs can make no claim to urgently need the Court's protection.

Nor does the fact that the Court has granted review in *Hartigan v. Zbaraz*, S. Ct. No. 85-673 (review granted, jurisdiction postponed October 16, 1986), justify immediate review of this case. This Court has, in a few special instances, granted certiorari prior to judgment in cases which present similar or identical issues to those already pending before the Court in another case.[4] The tentative pendency of *Zbaraz* with the question of jurisdiction reserved (55 U.S.L.W. 3257), however, presents no argument for prejudgment consideration of this case because the issues presented clearly are not the same. These cases arise neither under the same statute nor under the same facts.

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[4] *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392 (1970) (issues arising from I.C.C. and reorganization court action pertinent to a single proposed merger); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) (cases involving the same facts all questioning coverage of the same federal statute).

In *Zbaraz* the Court has granted review over the narrow issue of whether a 24-hour waiting period following parent notification is facially invalid if coupled with a judicial alternative to notice which has been enjoined pending rulemaking by the Illinois Supreme Court. The lone general similarity between the *Zbaraz* issue and this case lies in the fact that both the Illinois and Minnesota statutes employ a waiting period. However, consideration of the district court's decision about the Minnesota waiting period would be of little value in judging the *Zbaraz* statute. Nor will resolution of *Zbaraz* conclude the numerous issues on appeal to the Eighth Circuit in this case.

As to the Minnesota waiting period, the district court said:

> The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. *Under conditions presently existing in Minnesota*, however, *48 hours is an unreasonable waiting period.* Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343 (2).

P.A. at 131a (emphasis added). Thus one issue in this case involves determination of whether specifically a 48-hour waiting period which was held facially valid is somehow unreasonable due to "conditions presently existing in Minnesota."

The trial court's decision makes no judgment about a given specific shorter waiting period in Minnesota or a 48-hour period under conditions which may exist in other states. Neither will determination of the facial validity of the Illinois statute necessarily resolve the practical validity of the Minnesota waiting period. Thus it is clear that this case

and *Zbaraz* do not present the same issue, even when one focuses solely on the question of waiting period.

In addition, this case, as it exists on appeal in the Eighth Circuit, presents questions which go much beyond the narrow *Zbaraz* question. These include, from the Defendants' perspective, the constitutional necessity and utility of a judicial bypass alternative to a parental notification requirement and the validity of a two-parent notice requirement coupled with a properly functioning judicial bypass system.

On the other hand, Defendants assert that the supposed complete record in this case should be employed by the Court to address the validity of all parental notice requirements everywhere, including that under review in *Zbaraz*. Defendants' arguments in this regard wholly misconstrue both the state of the law in this area and the nature of the issues which were set forth for trial in this case.

If this case may be taken as establishing any fact of nationwide applicability, it is that, through conscientious effort, a state is indeed capable of implementing and carrying out a parent notification/judicial bypass system which complies in practice with the standards set forth by this Court. That is the issue that was properly tried and that is what the trial court properly found. In that respect the case could be seen as having some value in this Court's consideration of future cases involving judicial bypass.

In no sense whatever, however, can the record in this case be taken as "conclusively" demonstrating that even the Minnesota statute, let alone statutes in other states, serves no proper public purpose either on its face or in practice.

This Court in a number of past cases has plainly set forth the bases for the states' authority to require parental notification and even parental consent for minors' abortions. These

bases have been enunciated, not as issues of fact subject to trial, but as fundamental principles inherent in the very fabric of our culture, society and system of government. *See, e.g., Bellotti v. Baird,* 443 U.S. 622 (1979), where this Court recognizes that:

> Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."
>
> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of law designed to aid discharge of that responsibility."

Id. at 638-39 (footnotes and citations omitted.) Thus, there is nothing in the constitutional jurisprudence involving minors' abortions to suggest that, to sustain a statute such

as that in Minnesota, a state must undertake to prove as matters of fact that minors are, on the whole, less mature and more vulnerable than adults; that our society and legal system is correct in presumptively committing the care, nurture, upbringing and control of children to their parents rather than the courts or individual "experts," or even that laws carefully designed to comport with these fundamental principles have achieved, in the short run, a specified quantum of success, in the eyes of the court, in fulfilling their goals. To the contrary, as Justice Stevens has properly observed in *H.L. v. Matheson*, 450 U.S. 398, 424 (1981):

> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur. Good faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

(Stevens, J., concurring.)

As noted above at pages 3-4, the trial court accepted these principles as settled matters of law, not issues of fact for trial. Thus it set for trial the question of whether the Minnesota system actually functions in accord with this Court's announced standards. For these reasons the Defendants, for the most part, refrained from consuming the time

of the trial court or potential witnesses with philosophical or sociological debate over such issues as whether or not 14 year olds are capable of making any and all important decisions totally on their own, or whether or not the desire of a minor to conceal her actions which may lead to parental disappointment or disapproval in itself demonstrates maturity.[5] Neither did the state undertake to counter the testimony of the small number of minors and parents who feared[6] untoward consequences of parental notification with episodic testimony of particular notified parents or notifying minors upon their own relational development following notification.

The fact that such laborious evidence was not pertinent to the issues for trial and, therefore, not brought forth by no means demonstrates "conclusively" that it is nonexistent.

In point of fact, Plaintiffs' alleged "complete" record adds nothing to undercut this Court's prior decisions. In *Bellotti II*, *Matheson*, and *Ashcroft*, it was assumed that many minors will urgently wish to conceal their sexual activity, pregnancy and proposed abortion and that parents when presented with such information may respond in various ways. The question is not whether these assumptions may be valid. Rather, assuming them valid, should parents have the opportunity to address the substantial medical, moral, ethical and psychological issues raised by their young daughter's sexual activity and pregnancy or does the Constitution itself demand that these matters be left absolutely to the girl and her abortion

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[5] This astounding bit of "expert" opinion was actually cited by the trial court in support of the conclusion that the Minnesota statute serves no purpose. *See* Final Order at 76a, 111a.

[6] Plaintiffs presented no direct evidence to establish that even one minor who had notified her parents in accordance with the law had actually been abused, maltreated or prevented from obtaining an abortion as a result of such notice.

provider or other "experts" who intersect her life for a brief period.

Furthermore, as noted above, it is clear that both large portions of the supposedly "complete" record and many of the "findings" of the trial court upon which Plaintiffs rely for support are, to the extent relevant at all, pertinent only to Minnesota. *See, e.g.*, district court findings numbered 22-28[7] (availability of abortion services in Minnesota); 54-57[8] (handling of bypass applications by Minnesota courts); 59[9] (reference to the supposed hopes of some unnamed supporters before a Minnesota legislative committee); 68[10] (Minnesota minors residing with natural parents). *See also* Conclusions of Law at P.A. 130a where the trial court discusses "logistical obstacles" supposedly facing Minnesota women traveling from rural areas in Minnesota.

For these reasons it is clear that this case does not justify the extraordinary action of bypassing the jurisdiction of the court of appeals. Rather, this case should follow the orderly process set out by statute and rules for the appellate review of all but the most exigent matters.

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[7] P.A. at 45a-47a.
[8] P.A. at 64a-67a.
[9] P.A. at 68a.
[10] P.A. at 80a.

CONCLUSION

For the foregoing reasons Respondents urge the Court to deny the Petitioners' attempt to unnecessarily circumvent the normal appellate process. Should certiorari be granted, however, Respondents intend to seek review upon all the issues pending in the Court of Appeals for the Eighth Circuit through a cross-petition for certiorari to be separately filed.

Respectfully submitted,

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